

**Juniper Industries Inc.; Juniper Elbow Co., Inc.,  
also d/b/a Screen Guard and Local 719-S, Pro-  
duction, Service and Sales District Council,  
H.E.R.E., AFL-CIO**

**Juniper Industries Inc.; Juniper Elbow Co., Inc.,  
also d/b/a Screen Guard and Maceo Wilkinson.**  
Cases 29-CA-13616, 29-CA-13635, 29-CA-  
13706, 29-CA-13773, 29-CA-13790, and 29-  
CA-13829

May 21, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On March 4, 1992, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and con-

clusions<sup>2</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

1. The Respondent has excepted to certain credibility resolutions made by the judge. This matter was heard initially by Administrative Law Judge Harold Lawrence, who died before he could issue a decision. By letter of July 24, 1989, Associate Chief Administrative Law Judge Edwin Bennett notified the parties of Judge Lawrence's death and informed them of various possible courses of action for the disposition of the case, including designation of another judge to prepare a decision on the record made, or a hearing de novo before another judge at which utilization of the earlier record, or parts thereof, would be subject to the rulings of that judge.

The parties ultimately agreed to a hearing de novo. The Board then assigned the matter to Judge Snyder, who began a hearing on the case on October 22, 1990. On the second day of the hearing, the parties agreed to stipulate the record made before Judge Lawrence together with the record made the previous day before Judge Snyder, with all the exhibits, as the full record in the proceeding. They agreed that Judge Snyder would render a decision based on that record and waived the judge's viewing of witnesses who had not testified before him on the previous day.

The Respondent now excepts to certain credibility resolutions, emphasizing that they were not based on the hearing demeanor of the witnesses. It is true that the normal weight accorded to credibility determinations, *Standard Dry Wall Products*, 91 NLRB 544 (1950), does not apply in circumstances such as those here. However, where the parties have agreed to waive their right to have the judge view certain witnesses and have him render a decision on the written record before him, they have effectively agreed to permit credibility resolutions as well as findings of fact and conclusions of law to be determined by one who did not observe the demeanor of witnesses at the hearing. In those circumstances, deference is due the judge's credibility resolutions. In this case, we do not agree with the Respondent's contention that Judge Snyder's credibility resolutions were contrary to the evidence as established by the record as a whole. *Huttig Sash & Door*, 263 NLRB 1256 (1982), enfd. mem. 717 F.2d 1400 (11th Cir. 1983).

2. The judge found that two of the Respondent's foremen, Luis Aponte and Pete Morency, were statutory supervisors and agents of the Respondent and,

<sup>1</sup>In adopting the judge's findings that the discharges involved here violated Sec. 8(a)(3) and (1) of the Act, we note that, although he did not explicitly analyze the discharges under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), his findings are consistent with that decision. The Respondent argues that, assuming there was a prima facie case, the judge should have held that the Respondent prove that it would have taken the same action in the absence of protected activity. The judge, however, considered and rejected as invalid each of the Respondent's defenses to the allegations that its actions were unlawful, and the prima facie case is clear. Also see *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

We correct the following errors of the judge, which do not affect our decision. The judge credited employee Elvire Bottex's version of the events surrounding her discharge involving her supervisor, Raymond, noting that Raymond did not testify. It was stipulated in the record that the foreman known as Raymond was Ramnarine Sooknanan. Sooknanan did in fact testify and denied the conversation testified to by Bottex. However, we find that this error does not affect the outcome of this case in light of the judge's discrediting of all the Respondent's witnesses. Further, as the General Counsel argued, Raymond's testimony during cross-examination corroborated Bottex's insofar as Raymond admitted that when Bottex was laid off there was lots of work to be done. We further note that the judge, in describing Elliot Weiner's testimony regarding his written warning to employee Guito Jordain for leaving his work station, stated that Weiner had checked the bathroom by walking by but did not find it necessary to go in because there was no odor emanating from the bathroom. The record reflects that Weiner instead testified that he was able to check the bathroom by walking by because the bathroom had no door.

<sup>2</sup>The General Counsel excepts to the judge's failure to conclude that the Respondent's forceable removal of unlawfully discharged employee Jordain from the plant violated Sec. 8(a)(3) and (1). We find it unnecessary to pass on whether the removal itself was unlawful because we conclude that the Respondent's action was part and parcel of the unlawful discharge.

<sup>3</sup>We shall modify the judge's Order to more closely reflect and to fully remedy the violations found.

therefore, that their conduct was attributable to the Respondent. The judge essentially found supervisory status based on the foremen's authority to assign work, noting as well that they performed clerical work at their desks, were paid more than other employees in their departments, and were held out to employees as the representatives of management in their respective departments. He also noted that when employee Wilkinson asked the Respondent's vice president, Elliot Weiner, for a raise he was told to go through his foreman, Aponte. Finally, he made reference to the ratio of employees to supervisors. The Respondent excepts to these findings. For the reasons set forth below, we find merit to the Respondent's exception with respect to the status of Foreman Morency but agree with the judge's finding with respect to the status of Foreman Aponte.

Section 2(11) of the Act lists in the disjunctive the types of authority that give rise to supervisory status. Thus, the exercise of any one of the types of authority set out in Section 2(11) of the Act is sufficient to establish supervisor status. Such authority, however, must be exercised with independent judgment on behalf of management and not in a routine or sporadic manner. *The Door*, 297 NLRB 601 (1990).

As to Foreman Morency, we find that the General Counsel has failed to prove that he exercised independent judgment in his assignment of work so as to warrant a finding of supervisory status. Morency was the shipping department foreman. His duties essentially involved working at the loading dock and giving out work assignments in conjunction with that work, as well as taking care of customers. The tasks usually associated with pulling orders and loading trucks have been found to be routine and to require little direct supervision. *Esco Corp.*, 298 NLRB 837 (1990); *Sears, Roebuck & Co.*, 292 NLRB 753 (1989); *Waterbed World*, 286 NLRB 425 (1987). Here, there is no evidence that Morency's assignments of work to other loading dock employees were other than routine or that these assignments required the exercise of independent judgment. In sum, although we agree with the judge that the record establishes that Morency assigned work, it is totally devoid of evidence that he did so with the independent judgment essential to a finding of supervisory status. *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991).

Nor are the secondary indicia of supervisory status noted by the judge determinative in the absence of evidence that an employee exercises that independent judgment that is essential to a finding of supervisory status or of any primary indicia of such status. The performance of clerical duties has not been considered sufficient to warrant a conclusion that a lead warehouseman is a supervisor. *Waterbed World*, supra. Similarly, higher compensation has not been found dis-

positive of supervisory status. *Polynesian Hospitality Tours*, 297 NLRB 228 (1989), *enfd.* 920 F.2d 71 (D.C. Cir. 1990); *Waterbed World*, supra; *Auto West Toyota*, 284 NLRB 659 (1987); *Ballou Brick Co.*, 277 NLRB 41 (1985). As to the ratio of employees to supervisors, this has not been found to establish supervisory status where, as here, little supervision is necessary given the routine nature of the jobs. *Auto West Toyota*, supra. Finally, the Board has rejected premising a finding that an individual is a supervisor on a respondent's holding out of that individual as a supervisor (if, indeed, the Respondent has done so) in the absence of evidence that the individual's duties warranted such a finding. *Polynesian Hospitality Tours*, supra.

We further find, contrary to the judge, that the evidence does not establish that Morency is an agent of the Respondent. In this regard, the General Counsel has failed to demonstrate that Morency was placed in the position of a conduit reflecting company policy so that employees could reasonably believe that Morency spoke for management in connection with the union campaign. *Multimatic Products*, 288 NLRB 1279, 1305 *fn.* 181 (1988); *Waterbed World*, supra.

Thus, in light of our finding that Morency was neither a supervisor nor an agent of the Respondent, we reverse the judge's finding that the statements made by Morency to employee Bottex after Bottex's layoff were attributable to the Respondent and violated Section 8(a)(1) of the Act. Similarly, in adopting the judge's finding that the Respondent's termination of Bottex was unlawful, we do not rely on Morency's statements to Bottex to support that finding.

In contrast to our conclusion regarding Foreman Morency, we find that the record evidence demonstrates that Foreman Aponte's authority with respect to the assignment of work was exercised with the independent judgment necessary for a finding of supervisory status. Aponte supervised the performance of welding and heavy fabrication work. There was testimony in the record that Aponte moved employees between jobs, sent employees from his area to other worksites, established priorities in work assignments, and gave instructions on how to perform work. That such instructions were not routine but rather involved the exercise of independent judgment is demonstrated clearly in the detailed and lengthy testimony concerning the Respondent's termination of employee Maceo Wilkinson. Aponte instructed Wilkinson and a helper not only to polish stainless steel plates, but gave specific instructions on how to accomplish the task. In this regard, there was considerable evidence that there were different ways to do the work involved. Aponte then oversaw the job to determine if the work was being correctly performed and, additionally, gave Wilkinson further guidance when he saw that the employees were having difficulty successfully performing

the assignment. Finally, Aponte testified that he assigned work based on employee experience and “what they can do,” which the Respondent in its brief interprets as a reference to employees’ skill. Thus, we find on the basis of the above that Aponte exercises discretion and independent judgment in the exercise of his authority to assign work and, therefore, is a supervisor under the Act. *Louisiana Gas Service Co.*, 303 NLRB 908 (1991); *Cannon Industries*, 291 NLRB 632 (1988); *Rose Metals Products*, 289 NLRB 1153 (1988); *Impact Industries*, 285 NLRB 5 (1987), reversed on other grounds 847 F.2d 379 (7th Cir. 1988).

3. Additionally, we disagree with the judge’s apparent finding that the Respondent violated the Act by Elliot Weiner’s search of employee lunchbags.<sup>4</sup> According to the facts as found by the judge, during late July or August 1988, Weiner stopped employee Wilkinson and another unidentified employee on their return from lunch and searched their lunchbags. Wilkinson asked why the bags were being searched and Weiner gave no reason. The employees complied with the search and then were told to proceed into the plant. The judge noted Weiner’s testimony that sometime on payday he would check lunchbags to see if employees were bringing alcoholic beverages into the plant but that Weiner was not sure when he had last checked prior to the event at issue.

Based on the recitation of his factual findings, and without further elaboration or discussion, the judge included in his Order a provision requiring the Respondent to cease and desist from engaging in searches of lunchbags of union adherents. We conclude that the judge’s factual findings do not warrant the finding of a violation. Thus, the judge made no specific finding, and the record does not show, that Wilkinson or any other employee was singled out for disparate treatment with respect to the searches of lunchbags because of union activity. Indeed, the record is not clear whether Wilkinson’s union activity was known by the Respondent at the time of the event at issue. Nor did the judge make a finding that the Respondent had not checked lunchbags in similar situations before this search. In these circumstances, we find that the evidence is insufficient to establish that the lunchbag search violated the Act.

#### ORDER

The National Labor Relations Board orders that the Respondent, Juniper Industries Inc.; Juniper Elbow Co., Inc., also d/b/a Screen Guard, Queens, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Interrogating employees in regard to their union desires or activities.

(b) Giving the impression that it is keeping under surveillance the union activities of its employees.

(c) Threatening to close the plant or move it if or because the employees select the Union as their bargaining agent.

(d) Telling employees that if they wanted overtime they should go to the Union for it.

(e) Threatening to reassign employees because of their union activities.

(f) Assigning employees more arduous or less desirable work because of their union activities.

(g) Restricting employees by making them seek permission of the production manager before leaving their work stations.

(h) Reducing the amount of time allowed for employees to leave work to cash their checks.

(i) Canceling Saturday overtime work.

(j) Discharging or terminating or otherwise discriminating against employees for supporting the Union or engaging in protected concerted activities.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Guito Jourdain, Ernst Jean, Hector Guerrero, and Maceo Wilkinson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(b) Remove from its files any reference to the unlawful discharges and any warning slips issued to them and notify the employees named immediately above, and Elvire Bottex, in writing, that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Make whole Elvire Bottex for the loss of earnings she sustained between July 12 and November 18, 1988, plus interest.

(e) Make whole employees for any lost wages as a result of the suspension of Saturday overtime assignments during the period of July through October or November 1988, plus interest.

(f) Post at its Metropolitan Avenue and 78th Street plants in New York City, copies of the attached notice

<sup>4</sup>Although the judge does not explicitly state that he finds the search of lunchbags unlawful, he provides a remedy for such a violation in his Order.

marked "Appendix"<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>5</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 719-S, Production, Service and Sales District Council, H.E.R.E., AFL-CIO or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT give the impression we are surveilling your union activities.

WE WILL NOT threaten to close our plants or move them if or because the employees choose a union as their collective-bargaining agent.

WE WILL NOT tell employees that if they want overtime work they should go to the Union for it.

WE WILL NOT threaten to reassign employees because of their union activities.

WE WILL NOT assign employees more arduous or less desirable work because of their union activities.

WE WILL NOT restrict employees by making them seek permission of the production manager before leaving their work station.

WE WILL NOT reduce the amount of time we have allowed employees to leave work to cash their checks.

WE WILL NOT cancel Saturday overtime work.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We have offered and Elvire Bottex has declined reinstatement to her former position.

WE WILL offer Guito Jourdain, Ernst Jean, Hector Guerrero, and Maceo Wilkinson immediately and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them and Elvire Bottex whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed any reference to their discharges and their warning slips from our files and such will not be used against them in any way.

WE WILL make employees whole for any lost wages as a result of our suspension of Saturday overtime assignments, plus interest.

JUNIPER INDUSTRIES INC.; JUNIPER  
ELBOW CO., INC., ALSO D/B/A SCREEN  
GUARD

*Elias Feuers, Esq.*, for the General Counsel.  
*Joseph S. Rosenthal, Esq.* and *Jacqueline I. Meyer, Esq.*  
(*Bondy & Schloss*), for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried in New York on January 23 through 27 and on February 27 and March 2, 1989,<sup>1</sup> before Judge Harold Lawrence and before me on October 22 and 23, 1990. After Judge Lawrence's untimely death, inquiries were made of the parties regarding further proceedings and it was determined that the case would be tried de novo. On the second day of the hearing before me the parties agreed to settle Case 29-CA-14311 and that matter was severed and withdrawn. The parties further agreed to stipulate the record made before Judge Lawrence together with the record made on October 22 before me, together with the exhibits, as the full record in this proceeding and on which I am issuing this decision.

The questions presented in this case are whether Respondent attempted to defeat the Union's organizational and representational activity by terminating on various dates, five of its employees and engaged in

<sup>1</sup> All dates are in 1988 unless specifically stated otherwise.

threats to terminate employees and move the plant, surveilled its employees' union activities or gave the impression it was doing so and engaged in other conduct designed to harass its employees in violation of Section 8(a)(1) and (3) of the Act.

On the entire record in this case, including the exhibits and transcript made before Judge Lawrence and me and considering the briefs filed by General Counsel and Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent Juniper Industries Inc. (Juniper) and Respondent Juniper Elbow Co., Inc., also d/b/a Screen Guard (Elbow), both also referred to as Respondent, the Company, or the Employer, are each corporations organized under and existing by virtue of the laws of the State of New York and are each doing business at 72-15 Metropolitan Avenue. in Queens, New York (Metro) and at another location on 78th Street (the 78th Street plant) and each is engaged in the manufacture, sale, and distribution of fabricated metals and related products.

During 1987 and 1988, Juniper and Elbow, in the conduct of their business operations, sold and shipped from the locations products valued in excess of \$50,000 directly to points outside of New York State with some products going to United States Navy facilities.

Juniper and Elbow are affiliated business enterprises with common officers, ownership, directors, management, and supervisors; have formulated and administered a common labor policy affecting their employees; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single-integrated enterprise.

Respondents Juniper and Elbow constitute a single-integrated business enterprise and a single employer within the meaning of the Act. I further find that each of them, and as a single employer, are each engaged in commerce within the meaning of Section 2(6) and (7) of the Act and I further find that Local 719-S, Production, Service, and Sales District Council, H.E.R.E., AFL-CIO (the Union) is a labor organization with the meaning of Section 2(5) of the Act.

### II. UNFAIR LABOR PRACTICES

#### A. Background

Juniper and Elbow each have Jesse Weiner as the president of their corporations and Elliot Weiner, his son, as the vice president. According to Respondent, these two plus Steve Leiberman, Dennis Rosenberg, and Morris Zipser, all of whom worked in the office at the Metro plant and George Aniwene, who for 2 years until September 9, was the production manager at Metro plant and Vladimir Kizner, the plant and production manager at the 78th Street plant, were the only supervisors in Respondent's employ. Respondent stated that they were salaried, had different medical plans, and were the only ones authorized to hire or fire employees or effectively recommend such.

Metro had between 85 and 110 employees during the relevant period while the 78th Street plant had 20 to 40 employees. During the 2 years Aniwene was the production manager he was the only one daily in the plant who had supervisory authority, by Respondent's definition, despite the fact that the Metro plant had production facilities in its basement and on three floors. Weiner said the foreman or "bosses" in the various departments were nothing more than leadmen who were older and had more experience than other employees and were able to give them directions and aid. Elliot Weiner said these foremen performed regular production work, were all hourly paid, received time and a half, and were on a different medical plan than were the managers and employees in the office.

Respondent's employees were a racially mixed group consisting mainly of Spanish 11 speaking employees and a small group of Haitian employees who spoke Creole and most of whom needed an interpreter when testifying.

Most of the activity in this case took place at the Metro plant, which is a three-story group of buildings, sitting some 50 feet back from the sidewalk, enclosed by a high chain link fence. There is a 24-foot driveway gate at the sidewalk and a perpendicular low chain link fence runs from its left side to the plant, separating this street level parking area from a ramp to the left which goes to the basement. Directly facing the gate is a loading dock for two trucks. Immediately to the right of the loading dock, while facing the plant are the two plant office windows. The plant entrance is next to the windows and above it to the right is a large clock.

Normal business hours were 8 a.m. to 5:45 p.m. on Mondays through Thursdays with the employees stopping work at 4:45 p.m. on Fridays. Employees were urged to come in and work from 7 to 8 a.m. on overtime and overtime was made available to employees on Saturday from 7 a.m. to noon.

Employees were required to punch a timeclock and the cards were maintained at the punch clock just inside the employees' entrance. The workweek according to Elliot Weiner ran from Monday to Friday and the payroll week ran from Tuesday through the following Monday with payday on Friday.

Respondent's products were made from various types of metal sheets by being cut, bent, welded, and polished when necessary. The size of the products ranged from a small butterfly shaped object which could be held in hand to a stainless steel piece 30 inches wide and 48 to 60 inches tall. Respondent had various departments in the plant through which these products moved from inception to final product.

The complaint alleges 8(a)(1) violations by Jesse and Elliot Weiner and by Foremen Aponte and Morency. As noted above, Respondent denied the supervisory status of the latter two and Elliot Weiner testified that only the production manager and various office personnel had the power to hire or fire employees or recommend such, or grant or recommend wage increases.

Maceo Wilkinson testified for General Counsel that he was told by Elliot Weiner to go through Foreman Aponte in seeking a raise and did so and got the raise. However, Foreman Aponte corroborated Elliot Weiner's testimony that he had no authority to hire or fire or recommend or grant raises.

The Board in some situations has found where a company sought to denigrate the status of its foremen, that a ratio of

employees to supervisors such as that claimed here was implausible and discounted such a claim.

In this case the foremen made assignments of work to other employees; performed clerical work on orders at their desks; and were paid the most of employees in their departments. Employees looked to them for assignments and they were the representatives of management in their departments. Elliot Weiner testified that all the employees who worked on the loading dock were equal and all knew what they had to do and that Foreman Morency was not a supervisor and did not give the loading dock personnel their assignments. When testifying concerning another matter, Weiner testified that he was out on the loading dock to give assignments and see that the work was done when Morency was absent due to an accident.

As will be set forth below, Elliot Weiner was not a credible witness and I do not credit his testimony or the testimony of Respondent's witnesses who corroborate his testimony when that testimony is contradicted by other credible witnesses.

In the matter of the supervisory status of Foremen Aponte and Morency, I find that although they may not possess all the indicia of supervisors, that they are held out to Respondent's employees as supervisors by Respondent and that they are supervisors. At the very least they are agents of Respondent, held out by Respondent as such and are so regarded by Respondent's employees. I find that Respondent is responsible for their statements and actions.

#### *B. Observations and Credibility*

After reading and analyzing the transcript and exhibits several things become apparent. It is clear Elliot Weiner was extremely hostile to the Union, its organization, and certification of it as a bargaining unit and to the people he thought were responsible for bringing it into the plant. He claimed that one of the individuals paid no attention to him and laughed in his face, that another deliberately ruined material, and that a third threatened him with a mallet. He equated what he said was a loss of production with the Union being present at the plant and testified he felt the union campaign affected productivity. The day the Union was voted into the plant he fired the production manager and took over plant operations. Over the next several days he made numerous changes in the way employees were treated, instituting without notice, new disciplinary procedures and restrictions on employees. Weiner testified that the employees, during the time of the union campaign, were getting arrogant, that things were breaking down, and that he waited until the campaign was completed before firing Production Manager George Aniwene. He testified he started pulling timecards where employees were not in at precisely 8 a.m. so they would have to come in and see him to get their timecards to go to work and this would put pressure on them. He stated "the second thing is, I started giving out written warnings if the guy was late, if he was away from his work station, if he wasn't performing satisfactorily. Because I found that if you make a guy sign a piece of paper, you know, it scares him a lot more." He acknowledged there was no such system prior to his taking over after the Union won the election.

Elliot Weiner exaggerated in statements and in his testimony, as for example telling an employee who sought a raise, that if the employee came in and worked an hour over-

time in the morning he would triple his take home pay. Concerning another discriminatee he testified that the job was overdue by a month which under further questioning was reduced to 1 or 2 weeks. He also testified regarding Maceo Wilkinson that Wilkinson had spoiled the 15 to 20 large pieces he was polishing. He was contradicted by Department Foreman Aponte who testified only that the work had not been completed and that it was not ruined. Other examples of distorted testimony will be described infra.

The most damaging thing to Elliot Weiner's credibility is his defense to the Elvire Bottex termination.

Elvire Bottex testified that when she reported to work on July 12 at 6:45 a.m., she saw two men standing near the front gate and was given a union authorization card by them. She left her purse in the plant and left the plant to get coffee. As she was returning to the plant she was again stopped by the two union organizers who asked her to sign a union card and she did so and was given a couple of extra cards. At that time she looked toward the plant and saw Elliot Weiner in the first window to the left of the employees' entrance looking at her. She testified that there were no trucks at the loading dock at that time and that trucks are usually found at the loading dock on Monday and Friday and that they are not necessarily there at any other time. When Bottex went into the plant and before she could start to work she was sent for by Elliot Weiner and terminated. This termination will be further considered hereafter. On direct examination and on cross-examination Bottex stated that she was standing at the plant gate a few feet from the perpendicular fence when she saw Elliot Weiner.

There was a 1-month break in the trial before Judge Lawrence and, in that time, Elliot Weiner drew up a scale drawing of the plant loading dock and gates and placed on that drawing two oblong portions as trucks. Weiner's drawing also shows a crack which corresponds to a crack in the cement that runs from near the midpoint of the truck on the right side towards the street and according to his scale drawing is about 9 feet from the right side of the gate. The trucks are drawn as oblong objects not counting for the reduced height of the cab and engine compartment in front of the van portion of the truck.

In discussing Respondent's Exhibit 7, Weiner testified he hired a commercial photographer and was with the photographer when the series of eight photographs showing the plant from the gate were taken. He said the photographer stood first near the left-hand side of the gate facing the building in the approximate position Bottex said she was and then he moved a couple of feet between each shot ending up approximately two-thirds of the way across the gate to the right and almost right on the crack. Weiner testified that he told the photographer to take the pictures all the way up to the crack and that he determined that you could not see into the window from any of the positions where the photographer took the pictures.

Respondent's attorney in describing Weiner's testimony said the photographs were taken at points 2 to 3 feet apart and the photographer starting at the left side of the gate moved to a position three quarters of the way across the gate and that the photographs show a person could not see into the office window even from that location. Respondent's counsel stated that he had a letter from the photographer stat-

ing that he started at the left-hand side and moved three quarters of the way across the gate to make those pictures.

Later on cross-examination, Weiner testified contrary to his earlier testimony that he was not with the photographer during the whole time the photographer was taking pictures but started him at one spot and saw him take the pictures as he moved across the gate entrance. He told the photographer to go up to the crack and that the photographer got within 1 foot of the crack in taking the pictures. Weiner testified that the photographer was right on the crack in the second picture.

The testimony of Weiner including the recap version by Respondent's counsel are demonstrably false as to the various positions of the photographer in taking the pictures and is demonstrated false by the pictures themselves.

Starting with the first picture in the eight-picture sequence, it is clear that the photographer is standing near the midline of the truck on the left since neither side of that truck is visible in the photograph. The right-hand or passenger side of the truck on the right is visible for nearly its entire length. Testimony was that these trucks are 8 feet wide. Viewing the sequence of pictures those angles do not change. Each of the remaining pictures show the center line of the truck on the left and nothing of the sides of that truck is visible, whereas the side of the truck on the right is visible at the same angle throughout the eight pictures. If the photographer had moved the 2 to 3 feet to his right from his initial position as Elliot Weiner testified, the photographer would have been nearly opposite the space between the two trucks and the angle of view of the right-hand truck would have changed and by the third move the driver's side of the left truck would be visible and little of the passenger side of the right truck would be seen. If the photographer had continued to move to the right at 10 feet he would have been near the midline of the truck on the right and the picture would have shown a head on view of the right truck with no side of it visible and the driver's side of the left truck would have been seen. But as the pictures demonstrate, the photographer remained standing near the center line of the truck on the left throughout the sequence of pictures.

As to Weiner's testimony that the photographer was on top of the crack in the second picture, this is not true since what the photographer did is tilt the camera upwards in those pictures where the crack comes to the lower right-hand corner of the picture, versus the other pictures where the crack comes out higher than the corner. This is shown by the fact that looking at the row of windows on the second floor when the photographer tilted the camera up, more rows of windows are visible than in the other pictures where the crack comes out above the corner.

Additionally, the shadows of the fence which runs perpendicularly from the street to the building and of the gate never change their position in the series of pictures. If the photographer had moved to his right as Elliot Weiner testified, those shadows relative to the ground and the trucks would have been in a different place. It is noted that Judge Lawrence raised a question regarding where the photographer was stationed, stating that he did not see much distinction between the photographs. Similarly, the General Counsel raised questions as to where the photographer stood.

Weiner testified both on direct and cross-examination to the preparation of Respondent's Exhibit 7, knowing his testi-

mony was untrue and the exhibit an attempt to obfuscate, in order to defeat the claim of Elvire Bottex. Weiner's false testimony, and attempt to deceive, shatters his credibility as to the Bottex termination. Where someone produces and swears to the truth of false and fraudulent evidence, I can place little if any reliability on any of that person's testimony. Further, where that person is the dominant figure in the company as the testimony demonstrates, and in the commission of the unfair labor practices, then I can place no reliability on other Respondent witnesses when they support Weiner's attempts to deny or deflect unfair labor practices, where their testimony and Weiner's contradict testimony by other credible witnesses.

Most of General Counsel's witnesses testified through an interpreter. On the whole they appeared from the transcript to be making an effort to tell the truth without embellishment. Their testimony was in the main coherent and plausible. This observation cannot be made of Respondent's testimony and in particular that of Elliot Weiner.

On the basis of this resolution of credibility it becomes unnecessary to resolve individual conflicts in testimony between General Counsel's witnesses and Respondent's witnesses but rather to credit General Counsel's witnesses if their testimony is reasonable, not self-contradictory, and plausible given all the facts and circumstances of this case.

### C. *Elvire Bottex*

Elvire Bottex is from Haiti, speaks Creole and a little English, and required the services of an interpreter in testifying. She was hired on April 18, by Jesse Weiner who spoke to her through Shipping Department Foreman Peter Morency who is also Haitian and speaks Creole. She worked for Morency for approximately 2 weeks and was transferred to a first floor department where she worked for a foreman named John. Raymond, the packing department foreman, asked that she be transferred there and she worked for him until her termination. Raymond had her teach a new employee named Naome how to do the work. Morency told Bottex that he attempted to get Raymond to let Bottex work in other departments and Raymond always refused because she did her work well. On Tuesday, July 12, she arrived at the plant in a car with several other Haitians including Ernst Jean who was an electrician. She walked past union organizers at the plant gate and took a card from them. After dropping her purse she left to get coffee and, on her way back into the plant, was again approached by the two union organizers at the gate, took a second card from them, signed it, and gave it back to them. As she was doing so she looked towards the plant and saw Elliot Weiner in the window immediately to the left of the employee entrance looking at her.

Bottex testified that there were no trucks at the loading dock that morning and that trucks were usually there on Mondays and Fridays. Guito Jourdain, who rode in the same carpool with Bottex, testified that on the following day when he got out of the car he was handed a union card at the plant gate and had it in his hand as he went toward the plant and saw Elliot Weiner standing by a window looking at the gate. He stated that no trucks were parked at the loading dock that morning.

When Bottex got to the shipping department and started to get ready for work, Ernst Jean came by and told her Elliot Weiner wanted to see her. Jean acted as the interpreter in her

conversation with Weiner who told her he had no work for her, that work had gotten slow, and that he would call her back some time. She asked Weiner if he thought she had punched in and then left work to go buy coffee. He said no that he did not think that. She asked to be paid and he said she would have to wait until 8 a.m. because the person who prepared the payroll wouldn't be there until 8 a.m. She returned to the shipping department and talked to Foreman Raymond through Naome who translated for her. She told Raymond what had happened and he said he would go talk to Elliot Weiner and left to do so. When he came back Raymond said he had told Elliot Weiner that there was a lot of unfinished work and asked how he was going to get the work done. Raymond said he did every thing he could to keep her but Elliot Weiner did not want to do so. She told Raymond that perhaps Weiner did not want her because she spoke with the union people and signed a card. Raymond did not answer and did not testify.

Ernst Jean, a Haitian who was an electrician at the plant, corroborated Bottex's testimony of her meeting with Weiner. Jean was told by Weiner that he was going to lay off Bottex. Jean said there was a part-timer working on the second floor and if there was no work on the first floor Weiner should move her to the second floor. Weiner replied that he had no work for her. Later that same morning he heard Weiner and Raymond discussing Bottex. Raymond asked Weiner why he had fired her, that he had a lot of work for her to do. Weiner said you may have work for her but I don't.

On July 18, Morency called her at home and said one of the employees told him she had been fired. He said he had told Weiner that he could send her to another department but that Weiner replied he did not have work for her and had fired her because too many in the factory liked her and he did not want her to get others in the factory to sign union cards as she had done. Morency said that if he had been there that day he would not have let her sign the union card and knew that they had fired her because she had signed it. Peter Morency testified for Respondent that he had a conversation with Bottex on July 12, when she called to inquire about his accident but stated that he did not talk to her after that and denied saying anything about the union card.

Morency corroborated Elliot Weiner in denying that he had any supervisory authority or any authority at all over any of the employees. He acknowledged that he had a desk and phone at which he worked on occasion. He stated that he was not aware of the Union's organizing during July 1988, but then said he did hear about it and saw some union men outside the plant gate. Morency said none of the men talked about the Union in front of him and that he never discussed the Union. He added that he did not know whether Elliot Weiner was for the Union or not; had never discussed it with Weiner; and did not know how Weiner or his father felt about the Union and never heard them talk about the Union.

In November, Bottex received a letter from Respondent offering her a job and she and her husband went to the plant and met with Weiner. The parties agreed she refused reinstatement as of November 18, 1988.

I do not credit Morency's denial of his conversation with Bottex and find that it did occur. I find that the remarks he made are attributable to Respondent and violate Section 8(a)(1) of the Act.

It is clear that Elliot Weiner saw Bottex take and sign a union authorization card and decided to nip her union activities in the bud. He laid her off as soon as she reported inside the plant. Weiner did not consult with anyone as to whether there was any work for Bottex to do. He was not the production manager at that point and according to his own testimony had left the production end of the business to Production Manager Aniwene at that time. The fact that Raymond protested to Weiner that he had work for her to do and was rebuffed by Elliot Weiner serves to underline the fact that Weiner terminated Bottex because he saw her sign a union card and was afraid that she would induce other employees in the plant to sign union cards. This conclusion is further bolstered by Morency's statement to Bottex that she was terminated for signing a union card and because Weiner thought she might get other employees to do so.

I conclude and find that Respondent terminated Elvire Bottex in violation of Section 8(a)(1) and (3) of the Act and offered her reinstatement which she refused and that Respondent's backpay liability for Bottex runs from July 12 until November 18, 1988.

#### D. *The 8(a)(1) Statement to Jourdain*

After Jourdain took the union card and went into the plant and punched his timecard on July 13, Elliot Weiner was standing near the timeclock. Jourdain had the union authorization card in his hand and Weiner said Jourdain had a ticket for a trip to Florida. Jourdain said Weiner was angry when he spoke and said further that he knew everybody who signed a union card and that if they all signed up for the Union he would move the factory to Florida and go with it. Weiner testified "I do not remember seeing any union card in his hand" and denied making the statement about the authorization card being a ticket to Florida. He sought to turn the statement by saying that the card was a lottery ticket so Jourdain could go to Florida. He also denied making the statement about closing the plant and moving it to Florida.

I find that Weiner made the statements attributed to him by Jourdain noting that the employees knew Jesse Weiner stayed in Florida part of the time and that the Weiners had businesses in Florida. I find that the statements were threats to close the plant if the employees brought in the Union and move it and that the statements violated Section 8(a)(1) of the Act.

#### E. *Ernst Jean*

Ernst Jean began his employment with Respondent on July 6, 1987, as an electrician. He had done some electrical work for Jesse Weiner's aunt who gave him a letter of recommendation. He told Elliott Weiner that he was capable of working with machines up to 400 volts and could handle the welding machines and showed Weiner his certification as an electrician and was hired. Later Angelo Guerrero was hired as an electrician after the other electrician named Walter left. Elliot divided the electrical work between them, telling Jean to take care of the welding machines and Angelo would take care of the other machines.

Jean signed a union card on July 15. Elliot Weiner asked if he had signed the card saying "if you signed the card I'm going to send you to Florida." He also asked Jean whether other people around him had signed union cards.

On July 18, Weiner called Jean to the office and said that most of the Haitians signed union cards. Jean said he did not know. Weiner said that if they signed union cards and the Union got in the plant, his father would close the plant.

Later, Jean asked Morency how he knew he, Jean, was in charge of getting employees to sign union cards. Morency answered that was what Elliot Weiner told him. Jean told Morency that he did not care what the Company did to him, that the Union was going to come in.

Jean testified that he gave out blank authorization cards and received signed authorization cards from employees which he turned over to the union organizers. He estimated he received as many as 30 signed cards.

In his work Jean used automotive type clamps which he got from the gas station close to the Company after getting a requisition from the office. He needed some clamps on an occasion after becoming involved with the Union and when he asked for a requisition he was told by Elliot Weiner that he did not want him to go out of the building, that he would send somebody else to get the clamps. At that time, the union organizers were standing outside the plant between the gate and the gas station.

Either then or shortly thereafter, while in the office with Elliot and Jesse Weiner, Jesse pointed to Jean and said "this guy doesn't like the company, next week we might send him to work on 78th Street." The following week Jean was sent to the 78th Street plant which employs only about one-third of the number of people at the Metro plant. Jean changed lightbulbs which was part of his maintenance work and was then told by Foreman Paul Scorci, that Elliot Weiner who was then at the 78th Street plant told him to put Jean on a grinder job. Jean protested that he was an electrician and was not supposed to work on grinders. He went to see Elliot who told him to see Vladimir Kizner, the 78th Street plant manager. Jean went to him and was told he was to work as a grinder operator. Jean refused saying he was an electrician and grinding was not his job. Elliot Weiner told him that he had to do whatever he was told to do. When Jean again said his job was an electrician, Weiner called his father at the Metro plant and was told to bring Jean back there. Jean asked the Weiners why they were trying to make him work as a grinder while they kept Angelo Guerrero on as an electrician. Jesse Weiner said Jean had to do whatever they told him to do. He said they gave him a job as an electrician and he was going to do an electrician's job, not something else. He was terminated. Jean was not told that Respondent had any problems with his work as an electrician which would have led to this transfer or termination.

A grinders job is learned in 15 to 30 minutes by an unskilled laborer who is usually paid at a minimal rate. It is clear that this transfer of Jean to a plant where there were less employees was an effort to interfere with his successful union activities at the Metro plant and to humiliate him by downgrading him from his job as an electrician to that of a laborer.

In defense to this discharge Elliot Weiner testified that in his work on the welding machines, Jean made some mistakes which "A-One Welding" reported to him. He claimed he received three reports which showed that Jean was doing improper work which led to this action. The reports would come with the invoice from "A-One Welding" for their work. Weiner stated that he or his father opened the mail and

immediately sent invoices on to the auditing department. The invoice which accompanied the third report was time stamped into that department 2 days after Jean was terminated.

Jean testified that he had never been criticized for his electrical work. Weiner did not say that he ever criticized Jean for his electrical work, and does not indicate that any foreman did so. In his testimony, Elliot Weiner stated that in addition to his electrical work Ernest Jean operated machines. Later, he recanted that testimony by saying that Jean would test the machines after he had done electrical work on them. There are other contradictions in Weiner's testimony. He said that the grinding work backed up when he sent Jean to do some of it. Later on he said he had told Jean to set up a new grinding machine. Elliot Weiner makes various claims and then backs away from them, so that it is not clear from his testimony why he says he sent Jean to the 78th Street plant to do grinding work.

Jesse Weiner did not testify in this proceeding and there was no denial of the statement by Jesse Weiner about sending Jean to the 78th Street plant. I credit Jean's testimony.

I conclude and find that Respondent sought to remove Jean from its employ because of his prominence in the union organizational activities by exiling him to the 78th Street plant and downgrading him from an electrician to a grinders job. I discredit Elliot Weiner's claim that he did not know Jean had signed a union card or had gotten others to do so. Jean's credited testimony shows that claim to be false.

I conclude and find that Respondent terminated Ernst Jean on July 29 because of his union activities and has not thereafter offered him reinstatement in violation of Section 8(a)(1) and (3) of the Act.

I conclude and find that Elliot Weiner's interrogation and Florida threat on July 15, the impression of surveillance by indicating he knew the Haitians had signed union cards, and the threat to move the plant on July 18 or 19, and Jesse Weiner's threat to transfer Jean to the 78th Street plant on or about July 21, all violated Section 8(a)(1) of the Act.

#### F. *Guito Jourdain*

Jourdain started with Respondent on August 14, 1985, and worked in laminating and cutting metal. His regular hours were from 7 a.m. to 5:45 or 6 p.m. Monday through Thursday, leaving on Friday between 4 and 4:45 p.m. and on Saturday from 7 a.m. to noon. The regular lunch period at the Company was 12 to 12:45 p.m. The employees were paid on Fridays and until the Union won the election on September 9, the employees had been permitted to leave the company premises when they received their paychecks so that they could cash them, get lunch, and come back to work. Jourdain also testified that there were no rules forbidding use of the bathroom which he used two or three times daily.

As noted above, Elliot Weiner started giving written warnings 1 or 2 days after he took over as production manager, having fired George Aniwene, the previous production manager, on the same day the Union won the election. Also noted was Elliot Weiner's creating a coercive and fearful atmosphere in the plant, grounding it on his asserted need to increase production which he said had gone down during Aniwene's time as production manager. He claimed the problems got worse during the Union's campaign.

Within a few days of the September 9 election, Elliot Weiner told Jourdain that he did not need a union in the plant and knew that a number of the employees had signed for the Union. In August, Weiner stopped Saturday overtime work, telling Jourdain that if he wanted Saturday work, to go to the Union for it. These statements I conclude and find violated Section 8(a)(1) of the Act, by Respondent indicating that union activities were under surveillance and that overtime work was stopped because of the union organizing campaign.

On September 16, Jourdain was working with Foreman Oscar on a machine that folds metal. After folding it is necessary to roll it and then the parts are put together leaving a seam which must be hammered down using a wooden mallet. From use the mallet gets a ridge which must be ground off.

Oscar told Jourdain to go use the grinding machine on the second floor, Jourdain said he took 5 or 6 minutes to grind the mallet and while returning saw Elliot Weiner coming from the first to the second floor. Nothing was said by either. When he returned to work Oscar said Weiner had asked for him and he said Jourdain had gone to repair his hammer.

A few minutes later Weiner handed him a printed warning slip (G.C. Exh. 6) which Jourdain said was blank and told him to sign it and he did. Weiner told Jourdain he would have to check with Weiner whenever he wanted to leave his work station or leave work early. On the previous day Jourdain got Oscar's approval to leave work early. Previous to this no employee had ever been disciplined or talked to about leaving early if they notified their local foreman. Weiner told Jourdain to come to the office if he was leaving early or to tell him if he was not coming to work. Jourdain asked why he could not tell Oscar, and was told by Weiner not to. After signing the paper, Jourdain resumed work and within a few minutes Weiner came back with another paper and told Jourdain to sign it, that when Jourdain was not working he was not to leave his work area. Jourdain refused to sign the document (G.C. Exh. 7). Weiner said Jourdain would have to sign it or he would be fired. Jourdain said he would not sign and Weiner asked why. Jourdain said that if he wanted a drink of water or had to go to the basement or to the bathroom he would have to go ask Weiner first. Weiner did not dispute that, but told Jourdain he would have to sign the paper or leave, Jourdain said he wanted to speak to Weiner about this problem and Weiner said he would have to leave the plant and go outside and he would talk there. Jourdain, again refused saying that they would have to pay him his vacation pay and give him a document to take for unemployment. Weiner said he would not give him anything and Jourdain asked why. Weiner replied because he knew all the Haitians signed for the Union and he did not need a Haitian in that job. Jourdain again asked why and Weiner said because all the Haitians had signed for the Union. Jourdain pointed out that the Union won with 77 votes and that there were only 7 Haitians in the plant. Weiner repeated that he did not need Haitians on his job and for Jourdain to leave. Jesse Weiner asked what was happening and Elliot Weiner told him not to get involved that he would handle it. Jourdain said that since Elliot Weiner was not giving him his pay and what he requested he would not leave. Weiner called the police and Jourdain left after getting his personal belongings, being escorted from the plant by the police.

Elliot Weiner testified he went by Jourdain's work station and no one knew where Jourdain was. He went to the time-clock and saw that Jourdain had punched out at noon and he was not notified about it. On the next day he gave a warning to Jourdain telling him he had to notify Weiner or someone in the office if he was leaving or not coming in. Later that day, he saw Jourdain was not at his work station and he did not see him in the plant. Weiner said he walked by the bathroom but did not go in to see if Jourdain was there since there was no odor coming from the bathroom. Not having found Jourdain he wrote out another warning which he gave to Jourdain. Jourdain said he had been in the bathroom and Weiner said he was not because he had looked in the bathroom. He told Jourdain to sign the paper or he could not work there. Jourdain said he would not sign the paper, that he had protection that the Union was around now. Weiner replied that he should work the way he did before the Union came in, and not cause problems. He stated that at that point Jourdain started going crazy and started pounding the mallet, and he became frightened. He told Jourdain to punch out, but Jourdain refused and he punched his card and called the police to remove him.

I do not credit Elliot Weiner's testimony that he did not see a union card in Jourdain's hands or mention the Union. Although Weiner claims he was enforcing his new regulations, there is nothing other than Respondent's Exhibit 5, an undated hand-lettered cardboard sign stating that employees must notify the manager if they expect to be late or absent, which was at some time posted near the timeclock, as any sort of notification to employees of his new procedure. It is apparent that Weiner started to selectively write up those who he considered transgressors, who not just incidentally were union supporters. It is evident that Elliot Weiner considered the Haitians the core union group and eliminated four of the seven by the discharges in issue in this case.

Testimony indicated that if employees were going to be absent they usually would notify their foreman or send in word by someone. Elliot Weiner set up his new rules without informing employees of them and enforcing them with these written warnings, which he said he used because it scared employees. Weiner's actions in giving these two written warnings to Jourdain within the matter of a few minutes and adopting a tough attitude toward Jourdain was an evident attempt to provoke a reaction, which he succeeded in doing. His language to Jourdain indicates he was trying to push Jourdain into the reaction which he finally got. I find that Jourdain was provoked, and I find that Respondent sought to and did terminate Jourdain because of his union support and sentiments in violation of Section 8(a)(1) and (3) of the Act.

#### *G. Hector Guerrero*

Hector Guerrero started working for Respondent in October 1977 as a machine operator and worked on three different machines. Guerrero testified through a Spanish interpreter. During his nearly 11-year employment by Respondent which included a period when Elliot Weiner was the production manager before George Aniwene was hired for that position, Guerrero was late four or five times a month and was never reprimanded for such. He was also one of Respondent's better workers, stating that he had never been criticized about his work.

In July he received a union card from the organizers at the gate, and took it home, signed it, brought it back, and attempted to hand it to one of the organizers who told him to give it to Jean, the electrician in the plant. He did so.

Shortly thereafter, while with his brother and another employee, Foreman Aponte asked Hector if he had signed a union card and he said he had. Aponte said that those who signed or filled out union cards would be fired.

Although Aponte denied asking Guerrero if he had signed a union card or talking to him about the Union, I do not credit Aponte's denial. There is no reason to discredit Guerrero whose testimony appeared straightforward and involved other employees. Aponte and Morency both denied making any 8(a)(1) statements, consonant with Respondent's position and in keeping with Elliot Weiner's denial of making any such statements.

Accordingly, I find that the statements were made by Aponte, and were an interrogation and coercive threat violative of Section 8(a)(1).

On July 21, Guerrero asked Elliot Weiner for a raise and was told to start working at 7 a.m. instead of 7:45 and he would get a raise by doing such. Guerrero may not have understood what Weiner meant. In any event, Guerrero continued working the same hours although being late on occasion. On September 2, he again asked Weiner for a raise and Weiner said he did not need an increase, because if the Union won he would have to close the plant. This statement is a threat of plant closure violative of Section 8(a)(1) and I so find.

Following the union election, Guerrero was given three written warnings to sign by Elliot Weiner, two of them on 1 day. On the first occasion he was a few minutes late and his timecard was not in the rack. He asked Weiner for it and punched in after Weiner had him sign a paper. Guerrero testified that on each of the occasions there was nothing handwritten on these papers and identified the warning slips with his signature. Later that same day, he was near the bathroom when Weiner asked him to sign a second paper, which he did, and nothing more was said to him.

Guerrero testified that in the 10 years he had worked for the Company he went to the bathroom whenever he needed to do so and in his job had to go use different machines, some of which were on another floor. He said he had always been free to move around and do his work without asking anyone for permission to do so.

On September 15, he was again a few minutes late and at the timeclock, was given his timecard by Weiner, who asked him to sign another document. Again he testified that nothing was written on the document and he signed it.

Guerrero was at work on time on September 16 and 19. On September 19, he was working on some metal after first bending it in the basement shop when Weiner told him there was no more work for him. He said alright and punched out. Weiner and Guerrero agree that Weiner did not give him any reason for the termination.

Elliot Weiner testified that he fired Guerrero because he was a screwball, that he was slowing down, not doing his job. He stated that Guerrero had worked for the Company for 10 years or more and it was just no longer worthwhile to keep him; that he was not doing his job and was not delivering the product that Weiner thought he should be delivering. Weiner gave no details or documentation to substantiate this

testimony. He stated that Guerrero thought it was a joke and would laugh in his and the supervisors' faces. However, Weiner did not recall when Guerrero started laughing in his or others' faces. He said that when he became production manager he warned Guerrero about laughing in his face. Weiner's testimony and his aggressive stance on other matters makes this testimony appear implausible.

Weiner was then examined as to the position Respondent took regarding Guerrero's termination with state agencies concerning Guerrero's application for unemployment benefits. Both on the state papers and in Guerrero's personnel file kept by the Company was a statement that he was discharged for lateness and absenteeism and Weiner acknowledged that. Weiner added that he terminated Guerrero for "screwing off." Weiner admitted that there was nothing in the personnel file that showed Guerrero was late either on the day he was terminated or the day before. He next stated that he fired Guerrero for intentionally destroying material using the wrong type of pipe in what he was fabricating.

On one side we have the facts that Guerrero needed a Spanish interpreter during the trial and probably is not familiar with written English; his testimony that nothing was written on the disciplinary warning notices when he signed them; and that he was never warned about his working habits or work and was given no reason for his termination. On the other side we have Respondent's self-contradictory reasons for the termination, which were continually embellished by Weiner. Weiner's testimony is not credible and I conclude that Respondent's reasons for Guerrero's termination are false.

I have previously credited witnesses who testified that Elliot Weiner kept a lookout on the activities of the employees and union organizers at the front gate. It is possible that Weiner observed Guerrero taking a union card but there is no probative evidence to establish that. However, I have credited Guerrero's testimony that he was interrogated by Aponte as to whether he signed a union card and admitted he had been and was thereafter threatened about having done so. I have also previously found that Aponte is Respondent's agent and that Respondent is liable for his statements and actions. Here, the knowledge of Guerrero's union activity garnered by Aponte, is knowledge of Respondent. Weiner's warning notices to Guerrero were a part of his retaliation against the employees for voting the Union in or, as he put it, his way of scaring the employees. Here, Respondent harassed a long-time employee for his normal work activity and terminated him for asserted reasons not made known to the individual. The Board has long held that shifting of defenses or reasons for termination as Weiner did here is good grounds to discredit them, which I here do.

Accordingly, I find that Respondent by its termination of Hector Guerrero on September 19, 1988, violated Section 8(a)(1) and (3) of the Act.

#### *H. Maceo Wilkinson*

Wilkinson began his employment with Respondent in January 1985 as a welder working in the basement of the Metro building. In addition to welding, about 50 percent of the time during 1988 he worked on other machines, breaking material, rolling it, and on occasion he did some polishing. He testified that Foreman Aponte gave him all his work assignments throughout his employment and approved his leaving early or

time off. In 1987, he asked Elliot Weiner for a raise and was told to go through Aponte, not to come directly to Weiner. He asked Aponte for a raise and thereafter got one.

Wilkinson testified that on the payday following the union election, Elliot Weiner cut the time allowed employees to leave the plant to cash their checks. Aniwene gave out the employee checks by 11:45 a.m. and employees left to cash their checks and eat lunch. Following the election, Weiner gave out checks later so that employees got them as late as 11:58 a.m., which cut into their time, contrary to the prior practice.

Weiner admitted that he changed the practice, testifying that George Aniwene started giving checks to employees around 11:30 a.m. and the employees would stop work, look at their checks and leave stretching the lunch hour out beyond the additional 15 minutes the Company allowed for check cashing. This was another part of Weiner's crackdown program on the employees, to get "more production." I do not credit Weiner's time estimates, but rather credit the employees who were the recipients of his crackdown. I find that he nearly eliminated an employee benefit by reducing the check cashing time allowed the employees and that this was in retaliation against the employees for their bringing a union into the plant. This action violated Section 8(a)(1) of the Act.

Weiner testified that he stopped the Saturday overtime in July because it was extremely hot and the employees were not producing the amount of work he felt they should produce, and it was not worthwhile to continue. Weiner offered no evidence other than his statements concerning the lack of production. The Saturday overtime was not reinstated until October or November which was far after the time of excessive heat. There appeared to be no lack of work for the employees and Weiner did not make such a claim. Most employees who worked on Saturday considered the overtime pay a benefit. If the heat was the principal factor in the loss of production as Weiner indicated there was no reason not to reinstate it before he did so. I find that the cancellation of Saturday for the extended period was a reminder to the employees of Respondent's control of their work and income and was done for that purpose and violated Section 8(a)(1) and (3) of the Act.

Maceo Wilkinson was chosen as the shop steward for the Metro plant employees and their employee delegate on the negotiation committee. He had signed a union card on July 21. On September 14, Elliot Weiner gave him a written warning for leaving his place and loafing. He told Weiner that he had not been loafing and explained where he had been. Weiner told him to sign the warning slip if he wanted to continue working there. Wilkinson said no one had ever checked on where he was while working in the plant prior to that time.

During late July or August when returning from lunch, Weiner stopped Wilkinson and another employee and told them to open their lunch bags. Wilkinson asked why and Weiner told him to just open the damn bag and let him see in it. He complied and was told to go on into the plant.

Weiner testified that sometime on a payday he would check the employees lunch bags to see whether they were bringing alcoholic beverages into the plant. Weiner was not sure when he had last checked lunch bags prior to this occasion or who else he checked.

The first negotiation meeting between the Union and Company took place at Respondent attorney's office on October 6, with union representatives, Wilkinson, and an employee representative from the 78th Street plant. On the previous day at lunchtime Wilkinson told Aponte he would be absent the next day to attend a union negotiation meeting.

On October 7, when Wilkinson reported for work his timecard was not in the rack. He was told to see Weiner in the office. Weiner asked where he had been the day before. He told Weiner that he had to go to the union meeting. Weiner sent him on to work. An hour or so later Weiner gave him a written warning and asked him to sign it, saying Wilkinson had not told anyone he planned to be absent the previous day. Wilkinson protested that he had told Aponte, but Weiner told him to sign the paper. Wilkinson read the paper which said "Did not report to work, did not call, did not give notice." Wilkinson then wrote on the paper that he had told his foreman Aponte he would be absent and had his approval. He added that the union president some day earlier had notified the Company that Wilkinson would be at the negotiating meeting. Weiner told Wilkinson to sign the f—ing form. Wilkinson said he had a right to put his side of it on the paper and protested Weiner's language. Weiner replied, "Well this is war." Wilkinson said he did not do anything to Weiner and Weiner again told Wilkinson to sign the f—ing form. Wilkinson wrote his statement on the form and signed it.

On the back of this form is a statement which says that Louie Aponte informed me, he was only notified on Maceo's return to work on 10-7-88, was not notified previously. Underneath is a line and Aponte's signature. When shown the form, Aponte said he could not read it and signed it after Elliot Weiner had explained to him he was having a problem with Maceo because he had missed a day's work. There was no testimony that the statement was read to Aponte before he signed it. Aponte's testimony contradicts what was apparently written by Weiner.

On November 1, Wilkinson punched the timecard incorrectly and asked Jesse Weiner what to do. He was told to wait for Pete Morency, who would take care of it. A few minutes later he explained what happened to Morency and was told to leave the timecard on his desk, that he would take care of it. Wilkinson changed his clothes and started work. A short while later Elliot Weiner handed him a disciplinary notice, stating that he had clocked in at 7 a.m. but did not start work until 7:10. He explained to Weiner what had happened and wrote his explanation on the comment section stating there was no intentional delay on his part.

Prior to the November 10 negotiation meeting, Wilkinson told Respondent's attorney to notify the Company he would be attending the meeting, told Aponte the same thing, and called the company office and said that he would be absent to attend the negotiation meeting. On November 9, Wilkinson spoke to Elliot Weiner and said he did not want to cause trouble by being in the Union, and felt like it was an honor to be a representative of the Union. He said he did not know why Weiner was causing this problem about it. Weiner said Wilkinson was old enough to know better, that he should not come to him with this sort of a thing. After some further conversation Wilkinson said he had to take off the following day. Weiner said, "Okay, if you take off, if you continue being absent then you won't have to worry

about working here no more, if you're absent continually like this." Wilkinson protested the absence was for the union negotiation. Weiner said it did not make a difference, that Wilkinson knew right from wrong, and that he should have said no to being a representative for the Union and the union shop steward. I credit Wilkinson's testimony and find this threat of discharge by Elliot Weiner a violation of Section 8(a)(1) of the Act.

During the week prior to the December 14 negotiation meeting, Wilkinson reminded Aponte that he would be going to that meeting. Aponte said there was no problem as long as Wilkinson told him he was going to be absent.

On December 13, Aponte told Wilkinson to polish some 15 to 20 large stainless steel pieces which were about 3 by 5 feet. Wilkinson said he had not polished stainless steel for 2 to 3 years and did not do much polishing work. Aponte stated that Wilkinson had done a polishing job on stainless steel 1 to 2 months prior but said that he had never polished stainless steel panels.

Wilkinson was given a helper to hold the panels while he held and pushed the panels beneath the stationary polishing buffer cloth wheel. He said the 15 to 20 pieces had some dents, scratches, and bend marks on them prior to polishing and said he had not put any bumps or scratches on the pieces. According to Wilkinson, deep scratches could not be polished out with the soft buffing cloth that was on the wheel.

Although Aponte indicated Wilkinson started on the polishing job on December 12, Wilkinson testified specifically that he had not done so and had begun the job on the morning of December 13 and worked on it until about 11 o'clock, when he was terminated. With his assistant supporting the piece, Wilkinson would guide and push it under the buffing wheel, making one pass per side and did all the pieces with the buffing wheel in one position. The position of the wheel would be changed so he could make the next pass. He said that with the deep scratches on the pieces, putting them through once was not removing them and he did a second pass on some of them but because the guide was not stiff enough there was some waviness. He told Aponte that doing it Aponte's way was not working because of the deep scratches and asked to do it a different way. Aponte told him to do it the way he said and he continued to do so except that on occasions he went over a particular polished area a second time in order to try to remove the deep scratches.

Wilkinson said Aponte came back a couple of hours later and was not satisfied with the results and went to get Elliot Weiner. Weiner looked at it and told Wilkinson to get out. Wilkinson left the job, packed up his clothing, and went to the office to get his pay. Weiner told Wilkinson he could now work full time for the Union.

Weiner testified that Aponte was upset when he came to the office and told him to look at what Wilkinson was doing. Weiner said he looked at the work Wilkinson was doing, asked him if he had done it and when Wilkinson said yes, he fired Wilkinson. He said there was no discussion about the job or what Wilkinson had been told to do; that Wilkinson had been polishing for years and knew what to do. Weiner then started to embellish saying that Wilkinson was always polishing in that area and just did not care what he did, and that he ruined all 15 to 20 pieces.

Aponte said Wilkinson had polished stainless steel before, but that he may not have polished anything quite that big. He checked him on the job and he was doing it properly, but when he came back an hour or two later, he saw some bumps and bends in the material and told Wilkinson he was doing it the wrong way. He said that Wilkinson said nothing and he went to get Weiner, who when he saw the job said Wilkinson had spoiled the work, and he was terminated.

During cross-examination, Aponte admitted that the stainless steel pieces Wilkinson was working on would have scratches on them before they got to Wilkinson. In viewing the large piece of metal exhibit at the hearing, Aponte said there were scratches below the polished face of it, which indicates they were there before Wilkinson did the work. He said he set up the method to do it and that none of the pieces had ever been finished but that some of them had been started properly. Regarding the piece that was not coming out satisfactorily Aponte said he did not know why it was not coming out well. He said there were bumps along the metal but that otherwise Wilkinson was doing the job right. He finally admitted that the problem with the metal was not the polishing but the imperfections that were there before the polishing and that one bit of the polishing Wilkinson did was not done the way he wanted it.

Considering all the testimony, it is clear that Weiner again exaggerated excessively in stating that all the work was ruined. Aponte made it clear that a number of the panels had just been started and there was nothing wrong with them, that they just needed to be completed. As far as can be determined from the testimony there was only one panel that had a problem and it appears that the problem was not insuperable. Aponte did not know what was wrong with the polishing procedure and wanted some assistance from Weiner, which he did not get.

Wilkinson stated that he was familiar with polishing procedures and felt that a more abrasive polishing cloth was needed to remove the scratches, as well as a more rigid system to enable the work to be done smoothly since the large pieces had to be juggled by the two men while attempting to move them smoothly under the polishing wheel.

The fact that this was a large and difficult job and was given to Wilkinson and another helper on the day before he was due to appear at a union negotiating session raises the spectra of whether this assignment and Weiner's reaction to it were planned. Whether this was a setup or not, it is clear that Weiner overreacted to what occurred. His testimony is contradicted by Aponte as to the damage done to the pieces, and Aponte was at a loss to understand what was wrong with the polishing procedure. In the background of this is Weiner's statement, noted above, concerning Wilkinson's membership on the negotiating committee and as a shop steward that he would not have to worry about his job because he would not have it if he continued with the Union.

Weiner was ready to seize any opportunity to rid his Company of the Union and any union adherents. He put pressure on Wilkinson on a number of occasions to have Wilkinson abandon his shop steward and negotiation committee positions but Wilkinson clung to them. Weiner seized what he thought was the right opportunity and fired Wilkinson.

I conclude and find that Respondent's termination of Wilkinson on December 13 violated Section 8(a)(1) and (3) of the Act.

## CONCLUSION OF LAW

Respondent, by its threats and actions found above to be in violation of Section 8(a)(1), and by its termination of Elvire Bottex, Guito Jourdain, Ernst Jean, Hector Guerrero, and Maceo Wilkinson, as found above, violated Section 8(a)(1) and (3) of the Act.

## REMEDY

Having found that Respondent engaged in certain unfair labor practices, I conclude it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them

whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]